COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 007913-99 047233-01**

Joshua L. Williams	Employee
Shaw's Supermarkets, Inc.	Employer
Shaw's Supermarkets, Inc.	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Horan and McCarthy)

APPEARANCES
James S. Aven, Esq., for the employee
Linda D. Oliveira, Esq., for the self-insurer

CARROLL, J. The self-insurer appeals a decision in which an administrative judge ordered it to pay medical benefits under §§ 13 and 30 for the employee's work-related left foot injury. The self-insurer contends that the employee's injury was barred from workers' compensation coverage by way of the principles articulated in Zerofski's Case, 358 Mass. 590, 596 (1982)(injury must either result from a specific incident or series of incidents at work, or arise from an identifiable condition not common and necessary to all or great many occupations). We affirm the decision.

The employee was a warehouse worker in his early twenties, whose duties required him to stand constantly and frequently to step on and off platforms onto cement surfaces. (Dec. 5; Tr. 10.) The employee twice injured his left foot while working. The first time was on February 12, 1999, when he felt pain while stepping off a platform onto a cement surface. He sought treatment and remained out of work for two months. The second incident was on August 22, 2001, when he alighted from a fork lift and felt immediate pain in his left foot. The pain was worse than the prior occurrence, causing the employee to again seek treatment and to stay out of work for a period of time. The employee changed jobs to one which did not require as much standing or stepping on and off platforms. (Dec. 5-6.)

The employee's podiatrist, Dr. Sarah Derosier, diagnosed the employee as suffering from Morton's Neuroma, and treated him with steroid injections and a shoe insert. After the second incident, the employee suffered from extreme pain in his left foot, and Dr. Derosier referred him to a neurologist. The neurologist, Dr. Eneyni, suggested that the employee see a neurosurgeon. (Dec. 7.)

The employee filed a claim for medical benefits for prospective surgery to his left foot, which the judge denied at the § 10A conference. The employee appealed to a full evidentiary hearing, and was examined by an impartial physician, Dr. Stephen Johnson. Pursuant to § 11A(2),[1] the judge allowed the parties to introduce their own medical evidence due to the complexity of the medical issues. (Dec. 1-3.)

Dr. Johnson offered an opinion in which he essentially deferred, in all significant respects, to the opinions of the employee's treating podiatrist, Dr. Derosier.[2] (Dec. 9-10.) Dr. Derosier opined that the employee's diagnosis of Morton's Neuroma was causally related to his work, in which he frequently stepped down onto cement surfaces, and which condition commenced as of the February 12, 1999 incident, and continued to be aggravated by that movement until he stopped working for the employer sometime after August 22, 2001. (Dec. 10; Derosier Dep. 31-32.) After conservative treatments only provided some short lived relief, Dr. Derosier felt that surgery was the next logical step and referred the employee to a neurological surgeon. (Dec. 11, Tr. 20-21, 23.) The self-insurer introduced a report by Dr. John Coldewey, who rejected causal relationship

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[1] General Laws c. 152, § 11A (2), reads in pertinent part:

> the administrative judge may . . . authorize the submission of additional medical testimony when such judge finds that said testimony is required due to the complexity of the medical issues involved.

[2] An impartial physician's deferral to the opinions of a treating physician renders his report inadequate as a matter of law. LaGrasso v. Olympic Delivery Srv., Inc., 18 Mass. Workers' Comp. 48, 56-57 (2004). Here, however, the deficiency in the § 11A report was cured by the allowance of additional medical evidence based on complexity. (Dec. 1-3.)

between the employee's work and his Morton's Neuroma, but did opine that surgery was indicated for the condition. (Dec. 11; Self-insurer Ex. 2.)

The judge concluded that the employee had suffered work-related injuries to his left foot on February 12, 1999 and August 22, 2001. Adopting the opinion of Dr. Derosier, the judge found that "the injuries and resulting pain and disability of February 12, 1999 and August 22, 2001, [were] causally related to the described incidents and specific work activity he performed while employed with [the employer]." The judge further found that "the employee's medical care, specifically as it related to . . . surgical . . . services, is reasonable, necessary and related." (Dec. 12-13.)

The self-insurer contends that the employee's left foot condition did not fit the Zerofski definition of a compensable work injury. The trouble with the argument is that it ignores Zerofski's first prong of compensability, "a specific incident or series of incidents at work." Id. at 594-595. As noted above, the judge found two specific work injuries, the first on February 12, 1999 and the second on August 22, 2001**.** The acts of stepping off a platform or a forklift easily qualify as "specific incidents" under that first prong. See McManus's Case, 321 Mass. 171, 173 (1951)(merely bending over caused compensable hernia; cited favorably in Zerofski, supra at 593); Flaminio v. Central Motors, Inc., 17 Mass. Workers' Comp. Rep. 45 (2003)(act of lifting front of chair to move it back was "incident" under Zerofski). See Caswell's Case, 305 Mass. 500, 502 (1940)(injury arises out of employment if it arose out of employment looked at in any of its aspects).

As to the self-insurer's argument that the judge lacked authority to order payment of an anticipated surgery, we disagree. There is no need for a physician to risk non-payment, by going forward with a surgery without a determination of coverage under § 30.[3] We have not imposed such a restriction on claims for proposed § 30 medical benefits. See Marmorale v. Osco Drug, Inc., 5 Mass. Workers' Comp. Rep. 31, 33 (1991)(affirming judge's finding that a recommended arthroscopy was appropriate and

[3] Where the self-insurer had not commenced payments for a work related injury, no utilization review processes are triggered. 452 Code Mass. Regs. § 6.04 (4)(e).

reasonable). Moreover, the self-insurer raised no objection at hearing to the judge's consideration of the issue of the proposed surgery's coverage under § 30. (Tr. 5-6.)

Finally, the self-insurer is correct that the judge erred in finding that it had paid compensation for the 1999 incident, as there was no evidence adduced at the hearing establishing this.[4] The self-insurer contends that the judge's conclusion that the employee injured himself at work in 1999 is put into question by this erroneous finding. The error is harmless. The judge's findings on the employee's work-related injury on February 12, 1999 were sufficient to support her conclusion that the self-insurer was liable for the employee's left foot condition. There is no reasonable basis to construe the erroneous finding of prior payment by the self-insurer as casting any doubt on that conclusion.

The decision is affirmed. Pursuant to § 13A (6), the self-insurer is to pay employee's counsel a fee of $1,276.27.

So ordered.

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Martine Carroll
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **September 8, 2004**

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William A. McCarthy
Administrative Law Judge

[4] The self-insurer objected to the question apparently posed to elicit that evidence, and counsel for the employee withdrew it. (Tr. 12.)